ONG AH SENG

v.

ONG SIA LEONG

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CIVIL APPEAL NO: 12-01-96-I]
13 JANUARY 1998

BANKRUPTCY: *Partnership - Partner cannot prove in bankruptcy of another partner in competition with creditors of firm - When does the rule apply - Partner not adjudicated a bankrupt in earlier proceeding - Whether rule applies to prevent other partner proving debt in subsequent proceeding - Whether rule applies even if creditor does not prove in subsequent proceeding - Bankruptcy Act 1967, s. 49(1)*

BANKRUPTCY: *Partnership - Right to contribution - Whether claim for contribution a contingent liability that is provable - Bankruptcy Act 1967, ss. 2 & 40(3)*

BANKRUPTCY: *Discharge - Creditor did not prove in debtor's bankruptcy proceeding - Whether creditor may institute action for debt after debtor discharged - Whether bankrupt freed from all liabilities upon discharge - Bankruptcy Act 1967, s. 35(5)*

The appellant and the respondent were partners in a partnership firm against which a trade creditor obtained judgment on 20 December 1985. Consequently, on 26 January 1987, a receiving order was made against the partnership firm. In another bankruptcy proceeding instituted by a creditor bank on 7 April 1987, the appellant was adjudged a bankrupt but he was, on 31 July 1990, discharged. The trade creditor and the respondent did not prove in this bankruptcy of the appellant. The receiving order against the partnership firm was, on 14 June 1993, rescinded as a result of the respondent paying the trade creditor the judgment sum. Subsequently, upon an application by the respondent, the Sessions Court held that the appellant was liable to contribute half of the sum that was paid by the respondent to the trade creditor. The appellant appealed. The appeal was grounded on the contention that although there is a right to contribution as between partners, the right was lost when the appellant was discharged on 31 July 1990 as the respondent had not proved in the bankruptcy of the appellant despite the claim for contribution being a provable debt. Therefore, the appellant argued that pursuant to s. 35(5) of the Bankruptcy Act 1967 ('the Act'), he was freed from all liabilities upon his discharge. In determining this appeal, the court had to consider the issue

of whether the rule that a partner cannot prove in the bankruptcy of another partner in competition with the creditors of the partnership firm applied in the instant case.

Held:

[1] By s. 49(1) of the Act, the official assignee takes the place of a creditor for any unsatisfied balance of the earlier bankruptcy and is deemed the creditor for the purpose of the subsequent bankruptcy. However, that section only applies if the appellant was already made a bankrupt. Here, the appellant was not because the earlier bankruptcy proceedings instituted against the partnership firm only resulted in a receiving order being made and there was no adjudication order which means the appellant had not been made a bankrupt by the earlier bankruptcy proceedings. Thus, s. 49(1) of the Act did not apply and the official assignee could not be deemed to be a creditor (taking the place of the trade creditor) for the purpose of the subsequent bankruptcy of the appellant. Further, the trade creditor had not proved in the bankruptcy of the appellant and consequently, the rule against partner competing against the claim of the creditor did not apply.

[2] The right to contribution was a contingent liability that was provable. Such a conclusion accords with the intention of Parliament expressed in bankruptcy laws that all creditors shall be entitled to come in and prove and that the bankrupt should emerge from the bankruptcy freed from all liabilities. The broad purview of the Act is that the bankrupt is to be a freed man, freed not only from debts but from contracts, liabilities, engagements and contingencies of every kind. As the right to contribution was a provable debt, the appellant was therefore released from the claim when the appellant was discharged on 31 July 1990.

[Appeal allowed.]

Case(s) referred to:
George Hardy & Anor v. Richard Fothergill [1888] 13 App Cas 351 ***(foll)***
Hide, ex p Llynvi Coal v. Iron Co, Re [1871] LR 7 Ch 28 ***(foll)***
Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta Malaysia [1995] 2 CLJ 365 ***(refd)***
Wemyss, ex p Wemyss, Re [1884] 13 QBD 244 ***(refd)***
Wilcoxon, ex p Andrews, re [1884] 25 Ch D 505 ***(refd)***
Wolmershausen v. Gullick [1893] 2 Ch 514 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 8(1), 35(5), 40(3), 49(1)(2)
Bankruptcy Rules 1969, rr. 210, 221

Bankruptcy Act 1869 [UK], ss. 31, 40, 49

Other source(s) referred to:
Williams & Muir Hunter on Bankruptcy, 19th edn, p 222

For the appellant - Wong Siong Tung; M/s Tan, Yap & Tan Advocs
For the respondent - Augustine Ong; M/s A Ong Advocs

Reported by S Dharmendran

JUDGMENT

Ian HC Chin J:

This is an appeal against the decision of the learned Sessions Court judge handed down on 2 November 1995 in which he entered judgment against Ong Ah Seng ("the appellant") in favour of Ong Sia Leong ("the respondent") being 70% contribution of a partnership debt which the respondent had paid to a trade creditor in the manner which will be related later. The parties had traded in as partners under the partnership firm of Sheridan Interiors against which the trade creditor had on 20 December 1985 obtained judgment for the sum of RM42,500. A receiving order was then on 26 January 1987 made against the partnership firm. The appellant himself was separately in another bankruptcy proceeding instituted by a creditor bank adjudged a bankrupt on 7 April 1987 but was on 31 July 1990 discharged. The trade creditor and the respondent did not prove in this bankruptcy of the appellant. This was followed by the rescission of the receiving order against the partnership firm on 14 June 1993 after the respondent had between March 1993 and 15 May 1993 paid direct to the trade creditor a sum of RM7,500 and a further sum of RM35,000 was, after the rescission of the receiving order, paid to the trade creditor between July 1993 and March 1994, making up the total of RM42,500. Those were the facts agreed upon which the lower court was asked to decide as a matter of law and he did decide that the appellant was liable to contribute half of the said sum that was paid to the trade creditor. The various legal position or status of the parties that attain during the relevant period must be ascertained as they will provide the solutions to the issues. The starting point is the bankruptcy of the partnership firm.

Whether Right To Contribution Exists

Only a receiving order was made against the partnership firm and this order operated as if it was a receiving order made against all then partners (Rule 210, Bankruptcy Rules 1969). No receiving order was made and, in any event, it could only be made against the partners individually (r. 221, Bankruptcy Rules 1969. However, it appears that a person against whom a receiving order had been made may make full payment of the debts and apply to have the receiving order rescinded (*Wemyss, ex p Wemyss, Re* [1884] 13 QBD 244).

That is what happened in this case. The respondent made full payment of the debts owing by the partnership which, on his application, resulted in the rescission of the receiving order. Since the receiving order against the partnership operates as if it was against the appellant as well as the respondent, it is relevant to find the answer to the question of whether the respondent could at any stage have claimed against the appellant for contribution.

It is common ground that as between partners there is a right to contribution from the other partner in respect of the losses of the partnership and that, subject to contrary agreement, the losses should be shared equally. However, Mr. Wong Siong Tung, learned counsel for the appellant, contended that the right was lost when the appellant was discharged on 31 July 1990 and the respondent had not before the discharge proved in the bankruptcy of the appellant. For this purpose, Mr. Wong had submitted that though the payment by the respondent to the trade creditor was only made from 1993 to 1994 (which was after the appellant was discharged), the respondent nevertheless had a provable debt from which the appellant was, according to the provision of s. 35(5) of the Bankruptcy Act 1967, released when he was discharged.

Mr. Augustine Ong, learned counsel for the respondent, replied that the receiving order against the appellant was the result of proceedings that were taken out in contravention of s. 8(1) of the Bankruptcy Act 1967 which reads:

> 8(1). On the making of a receiving order the Official Assignee shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

At all relevant time there was in existence the receiving order against the partnership firm when the proceedings resulting in the bankruptcy of the appellant were taken and that, submitted Mr. Ong, was in contravention of s. 8(1). But learned counsel did not say what is the effect of such a contravention. However, to his credit, learned counsel, just before the court rises, referred to *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia* [1995] 2 CLJ 365; [1995] 1 MLJ 274 which held that s. 49(1) and (2) do allow a second receiving order and an adjudication order. Therefore, there is no question of any breach of s. 8(1).

But this leaves unanswered the question as to whether the claim for contribution was a "debt provable" in the bankruptcy of the appellant within the meaning of s. 8(1). Mr. Wong argued that the amount of the contribution was a mere matter of arithmetic not requiring any calculation and therefore

capable of being ascertained. That being so, learned counsel further submitted, it is a "debt and liability" within the meaning of s. 2 and therefore a debt provable in bankruptcy.

There is a first hurdle that argument has to clear and that is the rule that a partner cannot prove in the bankruptcy of another partner in competition with the creditors of the partnership firm (*Williams & Muir Hunter on Bankruptcy*, 19th edn, p. 222; *Wilcoxon, ex p Andrews, Re* [1884] CA 505). Mr. Wong argued that the rule does not apply because the trade creditor had not proved in the bankruptcy of the appellant, a fact not in dispute, but Mr. Ong replied that there was no need to prove in the bankruptcy of the appellant since the trade creditor had already proven in the bankruptcy of the partnership firm and rests his submission without any further elaboration. In my view, s. 49 has a bearing on this question and that section reads:

> 49(1) Where a second or subsequent receiving order is made against a bankrupt, or where an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceedings consequent upon any such order, the Official Assignee shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable in the last preceding bankruptcy against the property of the bankrupt in the subsequent bankruptcy.

Clearly then, by that section the official assignee had taken the place of a creditor for any unsatisfied balance of the earlier bankruptcy and is deemed the creditor for the purpose of the subsequent bankruptcy. However, that section only applies if the appellant was already made a bankrupt. He was not because the earlier bankruptcy proceedings only resulted in a receiving order being made and there was no adjudication order which means that the appellant had not been made a bankrupt by the earlier bankruptcy proceedings. This means s. 49(1) does not apply and the official assignee can not be deemed to be a creditor (taking the place of the trade creditor) for the purpose of the subsequent bankruptcy of the appellant. Therefore, Mr. Wong was correct in submitting that the creditor had not proved in the bankruptcy of the appellant and consequently the rule against partner competing against the claim of the creditor does not apply. This brings me to the question of whether the claim for a contribution was a "provable debt'.

Whether Right To Contribution Was A Provable Debt

Mr. Wong when arguing that there was a provable debt had relied on s. 40(3) but I will, for convenience, reproduce the whole section, *viz*.:

> 40 Description of debts provable in bankruptcy
>
> (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the receiving order for any debt or liability contracted by the debtor subsequent to the date of his so having notice.

(3) Save as provided in subsection (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject before his discharge by reason of any obligation incurred before the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

(4) An estimate shall be made by the Official Assignee of the value of any debt or liability provable under subsection (3) which, by reason of its being subject to any contingency or contingencies, or for any other reasons, does not bear a certain value.

(5) Any person aggrieved by any such estimate may appeal to the court.

(6) If in the opinion of the court the value of the debt or liability is incapable of being fairly estimated the court may make an order to that effect, and thereupon the debt liability shall for the purpose of this Act be deemed to be debt not provable in bankruptcy.

(7) If in the opinion of the court the value of the debt or liability is capable of being fairly estimated, the court may assess the same and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

As was submitted earlier and I agree, the amount of contribution sought is a mere matter of calculation and is therefore not in the nature of unliquidated damages; subs. 40(1) therefore does not apply. Subs. 40(2) is also of no relevance to this case. Mr. Wong submitted that the claim for a contribution is a debt or liability within the meaning of subs. 40(3). In this regard learned counsel referred to the definition of liability in s. 2 to argue that it is wide enough to include the claim for contribution. The definition of s. 2 reads:

> "liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur or is or is not likely to occur or capable of occurring, before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement or undertaking to pay, or capable or resulting in the payment of money or money's worth, whether the payment is as respects amount fixed or unliquidated or as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies, or as to mode of valuation capable of being ascertained by fixed rules or as matter of opinion;

Apart from the section, learned counsel, Mr. Wong, referred to several cases. The first of which is *George Hardy & Anor v. Richard Fothergill* [1888] 13 App Cas 351. The facts of that case are these. The assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenants (relating to repair) with the lessors. Eight years before the term expired, the assignee became a bankrupt and was later discharged. The lessees were not scheduled in the debtor's statement of affairs, no notices were sent to them and they tendered no proof in respect of the assignee's possible liability at the end of the term to indemnify upon the covenants to repair. After the term expired, the lessors recovered damages upon the covenants to repair and claim upon the indemnity. The court there held that the claim of the lessees was barred under s. 49 of the Bankruptcy Act 1869 by the order of discharge because s. 31, which is in *pari materia* with our s. 40 was, included the assignee's future and contingent liability to indemnify.

Another case relied on by Mr. Wong is *Wolmershausen v. Gullick* [1893] 2 Ch 514, 518, where it was held that the liability of a bankrupt co-surety to contribution though unascertained at the time of the bankruptcy proceedings was nevertheless a provable debt.

Given the authorities I have referred to, I am in agreement with Mr. Wong that the right to contribution was a contingent liability that was provable. Such a conclusion accords with the intention of Parliament expressed in the bankruptcy laws that all creditors shall be entitled to come in and prove and that the bankrupt should emerge from the bankruptcy freed from all liabilities (*Hardy v. Fothergill*, p. 364). It was also said in *Hide, ex p Llynvi Coal and Iron Co, Re* [1871] LR 7 Ch 28, 32, that the broad purview of the Bankruptcy Act is that the bankrupt is to be a freed man, freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind which statement, I am of the view, is also true of the Malaysian Bankruptcy Act.

Conclusion

The right to contribution being a provable debt, the appellant was therefore released from the claim when the appellant was discharged on 31 July 1990. Accordingly, I allow the appeal and set aside the judgment of the learned Sessions Court judge dated 4 November 1995 with cost to the appellant.